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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/629,759	07/30/2003	Glenn Roy	02105.002355	6813
61146	7590	03/08/2007		
PEPSICO, INC. c/o GOODWIN PROCTER LLP 599 LEXINGTON AVE NEW YORK, NY 10022			EXAMINER STULII, VERA	
			ART UNIT	PAPER NUMBER
			1761	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/08/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

Application No.

10/629,759

Applicant(s)

ROY ET AL.

Examiner

Vera Stulii

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 17 November 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-7, 10-13 and 15-25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-7, 10-13 and 15-25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

The Examiner of this application has changed. Please direct all further correspondence to Examiner Stulii.

#### ***Claim Rejections - 35 USC § 112***

Claims 24 and 25 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 24 and 25 recite limitation "the botanically derived color stabilizer is green coffee bean extract". It is not clear how these claims further limit claim 21, since claim 21 does not recite green coffee bean extract.

#### ***Claim Rejections - 35 USC § 102***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**Claims 1, 16-17 and 20-21 are rejected under 35 U.S.C. 102(b) as being anticipated by Tood, Jr (US 5,079,016) as evidenced by Pharmacology of Rosemary.**

With regard to claims 1, 16-17 and 20-21, Tood discloses color stabilized synthetic and natural carotenoid compositions comprising a natural antioxidant such as rosemary extract (Col. 2 lines 40-49). In regard to claim 1 and 21 Tood, Jr discloses synthetic carotenoids including beta-carotene, beta-apo-8-carotenal, etc as instantly claimed. In regard to claims 20-21. Tood, Jr discloses a method of stabilizing a beverage such as tomato juice utilizing rosemary extract (example 7). As evidenced by

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Pharmacology of Rosemary, the most important constituent of rosemary is caffeic acid.

Since Tood, Jr teaches the use of a botanically derived color stabilizer from rosemary extract containing caffeic acid as the main component, therefore the caffeic acid from rosemary as disclosed by Tood, Jr meets limitation of caffeic acid recited in claims 1 and 20-21, because caffeic acid is a major component in the rosemary extract.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**Claims 2-7, 10-13, 15, 18-19 and 22-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tood, Jr. (US 5,079,016) as evidenced by Pharmacology of Rosemary in view of Onishi et al (US 6,379,729) and Lenoble et al (US 5,908,650).**

The references and rejection are taken as cited in prior Office Action.

**Claims 24 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tood, Jr. (US 5,079,016) as evidenced by Pharmacology of Rosemary in view of Chien et al (US 2003/0003212) and Chang (US 5,336,510).**

Tood, Jr. is taken as cited above.

Tood, Jr discloses a method of stabilizing a beverage such as tomato juice utilizing rosemary extract (example 7).

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Todd, Jr does not disclose lemonade as a beverage, FD&C Yellow No.5 and FD&C Yellow No.6 as synthetic colors, green coffee bean extract as a botanically derived color stabilizer.

Chien et al disclose that "a variety of chlorogenic acids are found in green coffee beans" [0032]. Chien et al discloses that the use of these chlorogenic acids to decrease off-taste in various types of consumables [0033]. Chien et al disclose that "an off-taste may be due to carbonation in the product. Examples of carbonated products include ... citrus-flavored beverages" [0023].

Chang discloses color-stable beverage which contains food dye such as Yellow # 6 (Abstract). Chang discloses fortified sport drink beverage comprising lemon-lime flavor, FD&C Yellow No.5 and FD&C Yellow No.6 (Table 1).

Since Todd, Jr discloses a method of stabilizing a beverage such as tomato juice utilizing rosemary extract, and Chien et al discloses the use of chlorogenic acids (green coffee beans extracts) decrease off-taste in various types of consumables, and Chang discloses fortified sport drink beverage comprising lemon-lime flavor, FD&C Yellow No.5 and FD&C Yellow No.6, it would have been obvious to one of the ordinary skill in the art to modify invention of Todd, Jr and produce lemon flavored beverage by stabilizing color using FD&C Yellow No.5 and FD&C Yellow No.6 as taught by Chang and adding green coffee bean extracts (chlorogenic acid) to prevent off-taste as taught by Chien et al.

***Response to Arguments***

Applicant's arguments filed November 17 2007 have been fully considered but they are not persuasive.

At page 13 of the Reply to the Office Action of 07/19/2006 applicants states that "Tood fails to disclose or suggest if antioxidants may work in the absence of surface acting agents". In response to applicant's argument, the rejection teaches and thus renders the claimed invention obvious. The alleged inclusion of surface active agents in Tood is not excluded in the claims. In addition, the rejection of record clearly states the source of phenylpropenoic carbonyl as claimed.

At page 13 of the Reply to the Office Action of 07/19/2006 applicants states that "the art in stabilizing food colors is unpredictable". Applicant is welcome to provide evidence of predictability of claimed invention.

In response to applicant's argument that there is no suggestion to combine the references (pages 13-14 of reply), the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

It is submitted that the standard under 35 U.S.C.103 is not predictability. Applicant has the burden to show that the combined teachings of references do not render the claimed invention obvious and thus "predictable". Applicant is invited to submit

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evidence of such prior art unpredictability and compare it to that of claimed invention.

The art of record teaches the limitations as claimed Please refer to the office action were the examiner pointed out where the claimed limitations were met.

In regard to applicant argument that Onishi teaches that tea extract and caffeic acid derivatives produce a low stabilizing effect" (page 15 of reply), it is noted that the same compound is used in both Onishi and claimed invention. It is unclear how caffeic acid provides stabilizing effect in claimed invention and does not in combination of references. Applicant is invited to submit clear and convincing evidence to the contrary.

In regard to applicant's argument that Todd shows combined use of emulsifiers and rosemary, it is noted that claimed language does not exclude the use of emulsifiers. In regard to applicant's argument that Onishi discourages the use of tea extract, it is admitted that primary reference teaches tea extract, therefore arguments are moot.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of



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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

VS *U. Stulii*

  
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SUPERVISORY PATENT EXAMINER  
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